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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

KATTAN DIAMONDS & JEWELRY, INC., Plaintiff and Respondent, v. JOSH SHACHAR, Defendant and Appellant.	B222687 (Los Angeles County Super. Ct. Nos. BC354372, 397347)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth A. White, Judge. Affirmed.

Trojan Law Offices, R. Joseph Trojan, Dylan C. Dan for Defendant and Appellant.

Law Offices of Douglas S. Honig, Douglas S. Honig for Plaintiff and Respondent.

Appellant contends that the trial court's judgment finding him liable on a guaranty agreement for an amount in excess of $3 million is erroneous because (i) the claim on the guaranty agreement was barred by the statute of limitations, (ii) respondent was allowed to assert the claim after improperly splitting a single cause of action, (iii) respondent made judicial admissions that were contrary to the claim, and (iv) the subject guaranty agreement was ineffective. Finding none of these contentions persuasive, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Pertinent Evidence

This matter arose as a result of significant debts incurred by David Oren Shachar (David Oren) to plaintiff and respondent Kattan Diamonds & Jewelry, Inc. (Kattan Diamonds). In the late 1990's, David Oren worked for Kattan Diamonds as a sales agent, selling jewelry on a consignment basis. In approximately 2001, David Oren set up his own businesses, using various names including David Oren Inc. and David Oren Mfg. Inc., through which he received jewelry from Kattan Diamonds. David Oren was supposed to pay Kattan Diamonds for the jewelry it provided from receipts of sales that he made. Instead, he kept most of the money for himself. David Oren perpetuated the scheme by repeatedly assuring Kattan Diamonds that he would make good on his debts, and by passing checks that turned out to be bad.[1]

By 2003, David Oren owed several million dollars to Kattan Diamonds. In early October of that year, Nagib Kattan, vice president of Kattan Diamonds, attempted to negotiate a workout of the debt with David Oren. David Oren's brother, defendant and appellant Josh Shachar (Shachar), was involved in the negotiations.

David Oren, Shachar, Nagib Kattan, and others met on the night of October 6, 2003, at the house of Shachar's sister to discuss the matter. At that meeting, various agreements were executed, including a promissory note from David Oren and his companies to Kattan Diamonds. According to Nagib Kattan, prior to signing the note,

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[1] Numerous businesses in the Los Angeles jewelry district were victimized by David Oren. He was eventually prosecuted and convicted.

David Oren owed over $4,400,400 to Kattan Diamonds. However, Kattan Diamonds first agreed to compromise the amount to $3,764,216.26, and then further agreed to compromise the amount to $3,264,216.26, as stated in writing on the signature page of the promissory note, which was signed by David Oren and Nagib Kattan. The promissory note called for David Oren to make monthly payments to Kattan Diamonds. In the event of a missed payment, Kattan Diamonds had the right, within its sole discretion, to declare a default and immediately accelerate the entire unpaid balance. The promissory note further stated that it was secured by a "written Guaranty Agreement . . . executed and delivered concurrently herewith."

The central piece of evidence in this case was another document from the same meeting. It was a one-page document written by Shachar in Hebrew (referred to by the trial court, and, hereinafter, as the Hebrew Guaranty). At trial, Shachar characterized the document as "notes" and "scribbles" from the meeting that were nothing more than an attempt to establish a framework whereby Shachar could guarantee up to $500,000 of David Oren's debt to Kattan Diamonds. In contrast, at trial, Kattan Diamonds presented testimony by a certified Hebrew interpreter, who characterized the Hebrew Guaranty as a "formal writing" containing structurally sound sentences and no notes. Another certified Hebrew interpreter, also called by Kattan Diamonds, translated the document in pertinent part as follows: "To: Kattan Diamonds & Jewelry Inc. [¶] I the undersigned, Joshua Shachar, serve as guarantor for David Oren Shachar [¶] DBA David Oren MFG. [¶] DBA David Oren MFG. Inc. [¶] DBA OREN DAVID MFG. [¶] 1) In the amount of $500,000.00 . . . . [¶] 2) If as of year 2004 and beyond, the companies above mentioned . . . would fail to perform the covenants undertaken by them in their mutual agreements, I shall pay, in addition to the commitment of $500,000.00, a sum not to exceed the amount agreed upon for payment for that particular year. [¶] 3) In the event that Oren David Shachar or the companies above mentioned, fail to perform the covenants undertaken by them (See clause 2), Joshua Shachar commits to pay the amount specified in the contract for that particular year. [¶] 4) In the event that clause (3) above is enforced due to the fact that Mr. Oren Shachar or any of his companies, breached the agreement, Joshua

Shachar shall pay the specified amount for that year, and only that amount, in addition to his commitment to secure and guarantee the amount mentioned in clause (1) above." The Hebrew Guaranty was signed by Shachar.

Another key document in the case was one bearing the date October 14, 2003. This document, which was in English, was titled "Guaranteed Performance for David Oren Shachar Debt Restructuring Agreement" (referred to hereinafter as the English Guaranty). The document purported to supersede "any and all written documents whether written in English or Hebrew." It contained terms providing that, subject to certain conditions, Shachar would guarantee up to $500,000 of David Oren's debt to Kattan Diamonds. Shachar, in response to discovery requests and in deposition, initially denied ever signing the English Guaranty, even though his signature appeared on a signature line in the document. At trial, however, Shachar testified that he drafted and signed the document. The English Guaranty also contained a signature line for "Shlomo Kattan, President," which was never signed.[2]

Procedural History

David Oren did not make any monetary payments on the promissory note to Kattan Diamonds. On June 22, 2006, Kattan Diamonds sued Shachar for "breach of guaranty." Attached to the complaint was a copy of the English Guaranty—not the Hebrew Guaranty. The complaint alleged that the parties entered into the English Guaranty on October 14, 2003, that Shachar failed to perform under the terms of the English Guaranty, and that Shachar owed Kattan Diamonds $500,000 pursuant to the English Guaranty. Nowhere in the complaint was the Hebrew Guaranty mentioned.

On August 5, 2008, Kattan Diamonds sought leave of court to file a first amended complaint in order to assert, among other things, breach of the Hebrew Guaranty. At the hearing, the trial court denied the motion for leave to amend, but stated that Kattan

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[2] Shlomo Kattan is the brother of Nagib Kattan. Shlomo testified that he was never president of Kattan Diamonds.

Diamonds was not precluded from filing another lawsuit addressing the Hebrew Guaranty.

On August 29, 2008, Kattan Diamonds filed a new lawsuit in which it alleged that, in the event the English Guaranty was invalid, the Hebrew Guaranty was still a valid and binding obligation that had been breached by Shachar. In response, Shachar filed a demurrer, contending that the new lawsuit was improperly duplicative of the still-pending, original lawsuit, and that the claims in the new lawsuit were barred by the statute of limitations. Prior to hearing on the demurrer, the trial court consolidated the new lawsuit with the original action. Then, again prior to the hearing on the demurrer, Kattan Diamonds filed a first amended complaint in the consolidated action, alleging claims both for breach of the English Guaranty and—in the event the English Guaranty was invalid—for breach of the Hebrew Guaranty. Shachar did not file a demurrer in response to the newly operative first amended complaint. Instead, he filed an answer.

Trial

A seven-day bench trial was conducted in November 2009. On January 26, 2010, the trial court entered judgment in the amount of $3,016,152.26 in favor of Kattan Diamonds and against Shachar, as well as a statement of decision.

As reflected in the statement of decision, the trial court found that Shachar prepared and executed the Hebrew Guaranty, which obligated him to make payments that David Oren failed to make under the promissory note. The promissory note (and hence the Hebrew Guaranty) contained a continuing obligation of payment as follows: $90,000 in 2003; $350,000 per year in years 2004-2007; $460,000 per year from 2008 to 2011; and the unpaid balance of principal and accrued interest on December 31, 2011, unless the payments had been accelerated because of default. Prior to the filing of the lawsuit,

Kattan Diamonds never declared a default. The court calculated the total amount owing as $3,016,152.26.[3]

Pertinent to its decision, the trial court found that Shachar "testified untruthfully regarding material issues and facts in the case." His testimony regarding the October 6, 2003 meeting contradicted declarations previously submitted by Shachar and David Oren. In addition, Shachar originally denied signing various documents, and then changed his testimony at trial. The court's statement of decision read: "This continual blowing hot and cold on very important facts has impacted Defendant's credibility with this Court. At one time or another, Defendant denied the enforceability of all relevant agreements he signed." The court held that the English Guaranty did not revoke the Hebrew Guaranty because the English Guaranty was never signed by Kattan Diamonds, and Shachar himself originally denied signing the English Guaranty and then changed his testimony at trial. Thus, the English Guaranty was found to be unenforceable and of no legal effect, and the Hebrew Guaranty was controlling.

DISCUSSION

I. Statute of Limitations

Shachar's first argument on appeal is one that was not made in the trial court. Shachar contends that Kattan Diamond's claim for breach of the Hebrew Guaranty accrued on October 15, 2003, the date that David Oren's company David Oren Inc. filed for bankruptcy. Because the claim for breach of the Hebrew Guaranty was first filed on August 29, 2008, according to Shachar the claim was barred by Code of Civil Procedure section 337, subdivision 1's four-year statutory period.

For obligations payable in installments, the statute of limitations begins to run when each installment is due. (*White v. Moriarty* (1993) 15 Cal.App.4th 1290, 1299; *Garver v. Brace* (1996) 47 Cal.App.4th 995.) Since the promissory note executed by

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[3] This included a discount of $248,064, an amount Kattan Diamonds waived in acknowledgment that recovery of amounts that accrued before August 29, 2004, was barred by the statute of limitations.

David Oren provided for installment payments, and the Hebrew Guaranty called for Shachar's obligations to accrue based on amounts unpaid under the promissory note, the trial court found that Kattan Diamonds could recover for installments that came due on or after August 29, 2004 (four years before the filing of the claim on the Hebrew Guaranty).

Citing to cases arising in bankruptcy court, including *In re Skyler Ridge* (Bankr. C.D.Cal. 1987) 80 B.R. 500, 507, and *In re Princess Baking Corporation* (Bankr. S.D.Cal. 1980) 5 B.R. 587, 590-591, Shachar now argues that the statute of limitations accrued upon the October 15, 2003 bankruptcy of David Oren Inc. because the filing for bankruptcy served to accelerate the principal amounts of all claims against the debtor. Shachar posits that this automatic acceleration gave rise to an immediate claim against him pursuant to the Hebrew Guaranty, and therefore any action filed after October 15, 2007, would be time-barred.

We find no basis for reversal. Although Shachar pleaded a statute of limitations defense in the operative answer, the potential applicability of a statute of limitations defense was hardly mentioned by Shachar's counsel at trial. The statute of limitations is an affirmative defense, and a defendant who asserts its bears the burden of proving all of its elements. (*Samuels v. Mix* (1999) 22 Cal.4th 1, 10; *Ladd v. Warner Bros. Entertainment, Inc.* (2010) 184 Cal.App.4th 1298, 1309-1310.) Shachar did not prove that Kattan Diamonds' claim was time-barred.

Moreover, Shachar never made any sort of argument in the trial court even vaguely similar to the one he is asserting now—that the debts on the promissory note and the Hebrew Guaranty were accelerated under bankruptcy law. "It is well established that a party may not raise new issues on appeal not presented to the trial court." (*A Local & Regional Monitor v. City of Los Angeles* (1993) 12 Cal.App.4th 1773, 1804; *El Morro Community Assn. v. California Dept. of Parks & Recreation* (2004) 122 Cal.App.4th 1341, 1351.) Although the appellate court may find an exception to this rule when the issue is purely a question of law and involves important questions of public policy (see *A Local, supra*, 12 Cal.App.4th at p. 1804, fn. 13), this case does not present such a situation.

Shachar's statute of limitations argument is one that should have been made to the trial court. The case was tried before the court for seven days, numerous witnesses testified, and a host of fact-intensive issues was raised. Since the issue was not raised below, we decline to address it here.[4]

II. Consolidation and the First Amended Complaint

Shachar's next argument centers around the somewhat unusual procedural circumstances whereby Kattan Diamonds was allowed—eventually—to file a cause of action for breach of the Hebrew Guaranty. After filing its initial lawsuit in June 2006, Kattan Diamonds sought leave to amend in August 2008 to allege a claim for breach of the Hebrew Guaranty. The trial court denied the motion for leave to amend, but stated that Kattan Diamonds was not precluded from filing another lawsuit addressing the Hebrew Guaranty. Kattan Diamonds did file such a lawsuit, and eventually it moved to consolidate the action with the original lawsuit. The trial court found that consolidation was proper. Kattan Diamonds thereafter filed a first amended complaint in the consolidated action, alleging claims both for breach of the English Guaranty and—in the event the English Guaranty was invalid—for breach of the Hebrew Guaranty. Shachar answered this first amended complaint.

Shachar contends that Kattan Diamonds should not have been allowed to pursue its claim on the Hebrew Guaranty because its motion for leave to amend was denied, and any subsequent attempt to assert the claim was barred by the doctrine of res judicata or,

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[4] Even if were to consider Shachar's argument, we would not find it meritorious. Among other issues, the promissory note provided that its obligors were to be jointly and severally liable. David Oren Inc. and David Oren (the individual) were both obligors under the promissory note. David Oren did not file for bankruptcy in an individual capacity until November 15, 2004, well within the statutory cut-off period. Furthermore, the translation of the Hebrew Guaranty accepted by the trial court stated that Shachar would guarantee debts of David Oren and various companies, but did not contain reference to David Oren Inc. Shachar has not shown that David Oren Inc.'s bankruptcy filing gave rise to an immediate guaranty obligation by Shachar for the entire principal amount. Therefore, even if the issue were properly raised, reversal would be inappropriate.

in the alternative, by the rule against splitting a cause of action. Shachar's res judicata argument fails. In order for res judicata to apply, the same cause of action must have been previously adjudicated, resulting in a final judgment on the merits. (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 531.) There was no final judgment on the merits in the first lawsuit when Kattan Diamonds filed its second lawsuit. Even if (as asserted by Shachar) denial of a motion for leave to amend could constitute a final judgment on the merits, it would not have done so here. The trial court denied leave to amend because the trial date was quickly approaching, and it found that Kattan Diamonds had not been diligent in asserting the claim. The court specifically stated, however, that the plaintiff was not prejudiced by the denial of leave to amend, because it could file a separate lawsuit. This ruling did not reach the merits of the Hebrew Guaranty claim. Res judicata could not possibly apply.

Nor do we agree that the trial court should have prohibited Kattan Diamonds from pursuing its claim for breach of the Hebrew Guaranty because it constituted an improper splitting of a cause of action. Shachar's reliance on *Ricard v. Grobstein, Goldman, Stevenson, Sigel, LeVine & Mangel* (1992) 6 Cal.App.4th 157 (*Ricard*) is misplaced. In *Ricard*, the trial court struck malice allegations seeking punitive damages. Plaintiffs filed a first amended complaint, and similar punitive damages allegations were again stricken, without leave to amend. Plaintiffs sought leave of court to again allege punitive damages allegations, but leave was denied. They then filed a separate action (making an identical punitive damages claim) without complying with rules mandating the filing of a notice of related case. Defendants demurred, arguing that plaintiffs were seeking to circumvent the prior ruling, and the trial court agreed and dismissed the second lawsuit. The appellate court affirmed, holding that the trial court properly exercised its authority to strike sham pleadings and those not filed in conformity with prior rulings. (*Id.* at p. 162.) The court found that plaintiffs had violated the "primary rights theory, under which the invasion of one primary right gives rise to a single cause of action," by attempting to split a single cause of action. (*Ibid.*)

The circumstances in this case were clearly distinguishable. First, unlike the punitive damages allegations at issue in *Ricard*, the trial court here never found that the Hebrew Guaranty claim was improper. The trial court did not dismiss the cause of action or its supporting allegations, either through a motion to strike or a demurrer. Second, the trial court here explicitly stated on the record that Kattan Diamonds could pursue its Hebrew Guaranty claim. In contrast, in *Ricard*, the punitive damages allegations were stricken without leave to amend; no direction was given that plaintiffs could file another lawsuit. Third, Kattan Diamonds did not attempt to covertly file another lawsuit without filing a notice of related case. Rather, Kattan Diamonds moved the trial court to consolidate the cases, and the trial court properly exercised its discretion in doing so. The concerns present in *Ricard*—that plaintiffs were improperly attempting to circumvent the trial court's ruling—were not present here. Rather, the filing of the second lawsuit, the consolidation with the first lawsuit, and the eventual filing of the first amended complaint were all done at the trial court's direction.[5]

To put it briefly, through a somewhat convoluted procedural process, the end result was that Kattan Diamonds was eventually allowed to file an amended complaint alleging breach of the Hebrew Guaranty. A trial court has broad discretion to allow the amendment of a pleading, even up through the time of trial. (*Glaser v. Meyers* (1982) 137 Cal.App.3d 770, 776.) Shachar did not challenge the operative first amended complaint either by demurrer or motion to strike, and did not raise res judicata or abatement as defenses in his answer. We find no error by the trial court that would warrant reversal.

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5 Furthermore, this case does not present a clear violation of the primary rights theory as expressed in *Ricard*. In his opening brief, Shachar points out that the amended complaint asserting the Hebrew Guaranty "is based on [a] different theory, [a] different instrumentality, and it alleges different legal obligations against Shachar."

III. Judicial Admissions

Shachar further contends that Kattan Diamonds was bound by judicial admissions in its original complaint that precluded it from seeking recovery on the Hebrew Guaranty. In its original complaint filed in June 2006, Kattan Diamonds alleged "[o]n or about October 14, 2003, at Los Angeles, California, plaintiff and defendants entered into a written Guaranty Agreement. A true copy of that Guaranty Agreement is attached hereto . . . and incorporated herein by this reference." Only the English Guaranty was attached to the complaint. Kattan Diamonds alleged that the sum of $500,000 was owing on the English Guaranty, which amount Shachar had refused to pay.

In its first amended complaint filed in February 2009, Kattan Diamonds alleged that after the filing of the lawsuit, Shachar "repudiated" the English Guaranty. The first amended complaint still contained a cause of action for breach of the English Guaranty. It also included a cause of action on the Hebrew Guaranty alleging that, if the English Guaranty was invalid, then the Hebrew Guaranty was still a valid and binding obligation. The first amended complaint sought "at least $1,776,666.66 and up to $3,764,216.26" on the Hebrew Guaranty.

Shachar argues that since Kattan Diamonds originally alleged that it "entered into" the English Guaranty with Shachar, it should not have later been allowed to seek recovery for breach of the Hebrew Guaranty.[6] Shachar relies on the rule, generally arising in the context of demurrer, that "'[a] plaintiff may not discard factual allegations of a prior complaint, or avoid them by contradictory averments, in a superseding, amended pleading.'" (*Continental Ins. Co. v. Lexington Ins. Co.* (1997) 55 Cal.App.4th 637, 646.)

We find no merit to this argument. "[A] mere conclusion, or a 'mixed factual-legal conclusion' in a complaint, is not considered a binding judicial admission." (*Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324.) The original complaint's

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[6] By its terms, the English Guaranty purported to supersede "any and all written documents whether written in English or Hebrew."

statement that the parties "entered into" the English Guaranty was no more than a mixed factual-legal conclusion, as shown by events in the case. The English Guaranty could not have been entered into if it was not signed by Shachar. But, as reflected in the first amended complaint and trial testimony, Shachar consistently maintained that he did not sign the English Guaranty. He only changed his testimony at the time of trial. Furthermore, as found by the trial court, Kattan Diamonds never executed the English Guaranty, so it was unenforceable and had no legal effect. Indeed, on appeal Shachar himself argues that "the English Guaranty constituted an offer by Shachar that was rejected by Kattan [Diamonds]." These myriad issues show that the issue of whether the English Guaranty was "entered into" was a mixed one of law and fact.

In any event, in an amended complaint, a party is allowed to explain previous inconsistent allegations. (See *City of Pleasant Hill v. First Baptist Church* (1969) 1 Cal.App.3d 384, 419; *Owens v. Kings Supermarket* (1988) 198 Cal.App.3d 379, 384.) By alleging that Shachar repudiated the English Guaranty after the original complaint was filed, and alleging that the Hebrew Guaranty was effective if the English Guaranty was not, Kattan Diamonds adequately explained any possible inconsistency.

IV. <u>The Operative Guaranty Agreement</u>

Finally, Shachar contends that there was no evidentiary basis for the trial court's finding that the Hebrew Guaranty was binding, or for the judgment in excess of $3 million. "In general, in reviewing a judgment based upon a statement of decision following a bench trial, 'any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision.' [Citations.] In a substantial evidence challenge to a judgment, the appellate court will 'consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings].' [Citations.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment. [Citation.]" (*Estate of Young* (2008) 160 Cal.App.4th 62, 75-76.)

We find that substantial evidence supports the trial court's determination that the Hebrew Guaranty was binding. Nagib Kattan testified that the parties agreed at the October 6, 2003 meeting that Shachar would guarantee David Oren's promissory note, and the Hebrew Guaranty was given by Shachar pursuant to this agreement. Nagib Kattan further testified that he agreed to reduce the amount called for in the promissory note by $500,000 in exchange for Shachar's guaranty. The Hebrew Guaranty was signed by Shachar. Furthermore, David Oren's promissory note made multiple references to an accompanying "Guaranty Agreement." Although Shachar characterized the Hebrew Guaranty as just "notes" and "scribbles," the trial court found that he was not a credible witness because, throughout the case, he denied the enforceability of every relevant agreement he signed.

We also find that the trial court did not err in determining the total amount owing under the Hebrew Guaranty to be $3,016,152.26. As translated by Kattan Diamonds' expert certified Hebrew interpreter, and as reflected in the court's statement of decision, the Hebrew Guaranty provided that Shachar would serve as guarantor for David Oren in the amount of $500,000, and for amounts due in 2004 and beyond. It was a matter within the trial court's sound discretion to determine the credibility of this translation and to rely on it in making its decision.[7] The statement of decision held that the Hebrew Guaranty provided, in the event David Oren failed to make payments required under the promissory note, Shachar would become obligated to make the payments as guarantor. It was therefore proper to find Shachar liable for all amounts that accrued under the promissory note (less the amount of $248,064 that was barred by the statute of limitations).

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[7] Shachar also presented testimony regarding the meaning of the content of the Hebrew Guaranty. The trial court found that the translation presented by Kattan Diamonds was not inconsistent with Shachar's translation.

DISPOSITION

The judgment is affirmed.

BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.